No. 87-2048

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

TEXACO INC.,
Petitioner,
v.
RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING PETITIONER

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MOTION OF THE AMERICAN PETROLEUM INSTITUTE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The American Petroleum Institute ("API") and the National Association of Manufacturers of the United States of America ("NAM"), hereby seek leave pursuant to Rule 36.3 to file the attached brief as *amici curiae* in support of the Petitioner, Texaco Inc. ("Texaco"). While consent to file this brief has been obtained from Petitioner, Respondents have declined to grant their consent. Correspondence reflecting the parties' respective positions has been lodged with the Clerk.

API, a District of Columbia corporation, is a national trade association. It counts over 200 companies among

its membership, representing all facets of the petroleum industry: exploration, production, transportation, refining, and marketing. Many of API's members are engaged in marketing at both the wholesale and retail levels.

NAM is a non-profit voluntary business association incorporated under the laws of the State of New York. NAM represents some 13,000 companies located throughout the nation's fifty states, providing 85 percent of this country's manufacturing employment. NAM members produce 80 percent of all domestically manufactured goods. NAM is affiliated with 158,000 additional businesses through its relationship with the Associations Council and the National Industrial Council.

As a principal representative of America's manufacturing community, NAM has had a long history of interest and involvement in matters affecting the marketing and distribution of manufactured products. In that role, NAM has participated repeatedly as *amicus curiae* before this Court on issues critical to the nation's industry. So too, API has frequently participated on its industry's behalf in legislative, administrative, and judicial proceedings which present issues of national concern. This case presents just such an issue.

The implications of the Court of Appeals decision in *Hasbrouck* go far beyond the specific dispute between the parties here to encompass questions that affect the marketing of a wide variety of goods and commodities for sale throughout the nation. The members of both NAM and API have a vital interest in this Court's review of the *Hasbrouck* decision because many of them employ wholesale discounts in dual channel distribution systems in all parts of the country.

NAM and API believe their participation as *amici curiae* will provide the Court with a broader perspective on the principal question presented and will bring into focus the national significance of the distribution issue at the heart of this case. Accordingly, API and NAM respectfully seek the Court's leave to file the attached brief supporting Petitioner.

Respectfully submitted,

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QUESTION PRESENTED

This *amicus* brief addresses a single question: whether the fact that a supplier's uniform price to wholesalers is lower than its price to a retailer purchasing directly from the supplier can support a price discrimination claim by the retailer under Section 2(a) of the Robinson-Patman Act.

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BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING PETITIONER

This brief is submitted on behalf of the American Petroleum Institute and the National Association of Manufacturers as *amici curiae* in support of the Petitioner.

INTEREST OF *AMICI CURIAE*

The interest of *amici* is set out in the foregoing motion for leave to file this brief.

STATEMENT

Petitioner Texaco Inc. sold gasoline in the Spokane, Washington area until 1981. Respondents are twelve owners of retail service stations that purchased gasoline

directly from Texaco. Texaco also sold gasoline to two independent wholesalers in the Spokane area, Dompier Oil Company and Gull Oil Company. Texaco's price to the two independent wholesalers was less than its price to direct-buying retailers. Throughout the period at issue both Dompier and Gull resold at least a portion of the gasoline to independent retailers; Dompier sold exclusively to independent retailers until 1974. Pet. App. B4 n.4.

Respondents sued Texaco, alleging a violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). Respondents claimed that the wholesalers' price to retailers was less than Texaco's price to respondents, and that this price difference enabled the wholesaler-supplied service stations to undercut respondents' retail prices and so divert sales from respondents. The jury found for respondents and awarded untrebled damages of $449,900.

Texaco argued, both in the District Court and the Court of Appeals, that it had not violated Section 2(a) because it charged uniform prices to wholesalers and controlled neither the independent wholesalers' decision whether to pass through some portion of the discount to retailers, nor the retailers' decision whether to pass the discount through to consumers. The Court of Appeals nevertheless held that "a section 2(a) violation may occur if (1) the discount [the wholesalers] received was not cost-based and (2) all or a portion of it was passed on by [the wholesalers] to customers of theirs who competed with Hasbrouck." Pet. App. A8 (citations omitted). The Court of Appeals concluded that Texaco's wholesale prices were not cost-based because Texaco merely identified some of the functions performed by the wholesalers without providing an acceptable "quantitative justification" for the discount. *Id.* The Court of Appeals also concluded that respondents presented evidence sufficient to show that the wholesalers had passed through at least a portion of the discount to their retailer customers. *Id.* at A9.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Ninth Circuit in effect holds that the long-established and procompetitive practice of granting a uniform discount to wholesalers may constitute illegal price discrimination if there are also direct sales at a higher price to retailers in the same market. The court ruled that "sufficiently substantial" uniform discounts to wholesalers, which are not received by direct-buying retailers, may violate Section 2(a) if they are not based on the wholesalers' costs and a portion of the discount is passed on to retailers who compete with the direct-buying retailers. Pet. App. A8-A9.

The Court of Appeals decision, if not reversed, can have serious anticompetitive consequences for many markets throughout the country. The practice of simultaneous distribution by suppliers through wholesalers and through direct-buying retailers (a form of dual distribution) occurs throughout the economy, and reflects efforts by suppliers to maximize efficiency in distribution. But the Ninth Circuit's decision puts this method of distribution in jeopardy since there is no practical or legal way for suppliers to assure themselves that functional discounts to wholesalers are "cost-based" or not passed on to retailers. Consequently, the court's interpretation confronts suppliers with the unpalatable choice of treading close to the boundaries of vertical price-fixing or eliminating wholesale discounts or dual distribution entirely. Either course will harm competition and raise prices to consumers. And this will be so although it would be economically irrational for a supplier deliberately to price to wholesalers so as to injure the supplier's own retail customers, although the supplier is not discriminating between competitors since wholesalers and retailers operate at separate levels of the distributional chain, and although there is no reasonable basis on which a supplier should be held responsible for the consequences of independent pricing decisions by independent wholesalers.

The Ninth Circuit's interpretation is not required by the language of the statute or by its legislative history, and is at odds with a line of judicial decisions that uniform functional discounts do not violate the Act. Accordingly, the decision should be reversed.

ARGUMENT

I. THE DECISION BELOW INHIBITS COMPETITIVE PRICING AND INTERFERES WITH EFFICIENT MODES OF DISTRIBUTION

This Court has said repeatedly that the Robinson-Patman Act should be interpreted consistently with the procompetitive purposes of the antitrust statutes considered as a whole. *See Great A&P Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 458 (1978); *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 63 (1953). The decision below has ignored this principle. The ruling will harm consumers by inhibiting competitive pricing decisions by independent wholesalers, and by curtailing the use of economical and efficient distribution arrangements, all to the detriment of competition.

A. Dual Distribution Exists For Legitimate and Procompetitive Reasons

There are a variety of reasons that impel a supplier, to sell in the same area both to direct-buying retailers and to wholesalers who resell to retailers. Suppliers, attempting to maxmize returns from sales of their product, seek efficient distribution systems that deliver optimum products and services at minimum cost. Some retailers may be particularly capable of direct purchasing, whereas other retailers, sometimes smaller ones or those in rural locations, can best be served by wholesalers. Or the existence of dual distribution may reflect the continuing efforts of a supplier to stay abreast of a rapidly changing

market where shifts in demographics, economics, technology and product composition require flexibility and experimentation in differing modes of distribution. In other cases dual distribution may result from the fact that geographical areas best served by differing methods of distribution are partially overlapping.

Dual distribution is used by both large and small suppliers. Indeed, for some smaller manufacturers with limited resources, utilizing wholesalers for distribution while at the same time making direct sales to certain retailers is a near necessity. In addition, for suppliers of all sizes, each channel of distribution serves as a check on the efficiency of the other.

In the particular case of distribution of petroleum products, a Department of Energy study of petroleum marketing concluded that wholesalers frequently "are more efficient or better positioned to distribute in more widely dispersed areas where distribution costs tend to be relatively high for refiners." U.S. Department of Energy, "Draft—Deregulated Gasoline Marketing: Consequences for Competition, Competitors, and Consumers" 43 (March 1984). Moreover, since a dual distribution system allows two distribution channels—refiner to wholesaler to retailer, and refiner to retailer—to operate side by side in the same geographic area, competition in distribution is enhanced. Hence, the Department of Energy observed that in geographical areas where a supplier's product is distributed both through wholesalers and direct-buying retailers, competition is particularly intense and "the consumer [is] the ultimate beneficiary." *Id.* at 126.

B. Functional Discounts To Wholesalers Are Traditional and Procompetitive

Where a supplier has decided that it is efficient to use wholesalers to sell to a market, in addition to direct selling to retailers, it is customary to sell to the wholesalers at a lower price. Otherwise, the wholesaler's price to

retailers would inevitably exceed the supplier's own price to retailers, and the wholesalers would not long survive.

For many years prior to the *Hasbrouck* ruling—and, indeed, prior to passage of the Robinson-Patman Act—suppliers have sold their products to wholesalers at favorable prices, reflecting so-called functional or trade discounts, which roughly recognize the fact that the wholesaler is undertaking for the supplier responsibility for certain marketing and distribution functions. *See* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 3-4 (1962 & 1964 Supp.). Such functional discounts remain extremely common today.[1]

There is a built-in reason why wholesaler discounts will not be excessive in a dual distribution situation. Suppliers, having chosen a dual distribution system, have no reason to price so low to wholesalers that direct-buying retailers cannot compete with wholesaler-supplied retailers. The supplier has an incentive to offer the independent wholesaler a discount sufficient to induce it to service retailers that cannot economically buy directly from the supplier. But a supplier has no incentive to offer an excessive wholesale discount, since that in effect would give the wholesaler an unnecessary advantage in competing with the supplier itself for sales to retailers.

Moreover, if the supplier miscalculates by granting a larger than necessary discount to wholesalers, the miscalculation will be self-correcting since once the supplier finds that it is losing sales to wholesalers, it is likely to respond by adjusting the price differential between its price to wholesalers and its price to retailers. In addition, it is by no means clear that a miscalculation will re-

[1] Although in this case the price to wholesalers apparently was calculated as a discount off the tank-wagon price to retailers, and we therefore use the term "wholesaler's discount," in other situations the lower price to wholesalers in recognition of their functions may not be expressed as a "discount" from another price.

sult in even a transitory injury to competition. The independent wholesaler makes a variety of decisions for a number of reasons. It may simply pocket the larger discount as additional profits rather than passing it on to retailer customers. Or if it opts for a lower price, this may not be because of the discount but may be because it is unusually efficient, or unusually aggressive.

Consequently, it makes little economic sense to suppose that a supplier will adopt a price differential in favor of wholesalers that will have the effect of driving its direct-served retailers out of business. That observation is pertinent because the Court has said, in the context of Section 1 of the Sherman Act, that courts should be skeptical of an antitrust claim that "makes no economic sense." *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

There are, to be sure, complications that can arise in use of the wholesalers' discount in a dual distribution situation. These occur when the wholesaler is not independent and is a mere front for a supplier or a retailer. A so-called wholesaler may have no purpose other than to serve as a conduit for discounts to retailers that have organized it or otherwise control it. Or a supplier may channel sales through a "dummy" wholesaler that the supplier effectively controls, setting the price at resale, for the sole purpose of insulating the transaction from a claim that it favored the indirect buyer.[2]

[2] In this situation the wholesaler's customer will be regarded as an "indirect purchaser" from the supplier. It has been observed that "[c]ontrol over the resale price is the *sine qua non* for finding a wholesaler's customer to be the purchaser in fact." H. Shniderman & B. Leverich, *Price Discrimination in Perspective* 30 (2d ed. 1987). *See, e.g., Barnosky Oils, Inc.* v. *Union Oil Co.*, 665 F.2d 74, 83-84 (6th Cir. 1981); *Purolator Prods., Inc.* v. *FTC*, 352 F.2d 874, 883-84 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968).

But these complications are not present here.[3] The holding of the court that the wholesalers' discount was illegal was applied to transactions that did not suffer from the claim that the wholesalers were organized by and were a mere front for retailers;[4] and the indirect purchaser doctrine was not implicated since Texaco did not control the wholesaler and could not control the price at which the wholesalers resold.

The decision under review has attacked traditional discounts to independent wholesalers despite the fact that adverse effects upon direct-buying retailers are speculative, unpredictable, and highly unlikely to result from the discounts, and despite the fact that such discounts advance competition by facilitating the operation of dual distribution systems.

C. The Opinion Below Inhibits Competitive Distribution Arrangements

In this case, the Court of Appeals has contrived a novel doctrine that extends the reach of the Robinson-Patman Act with anticompetitive consequences.

The court held that when a wholesaler's discount was "sufficiently substantial", the discount must be justified by the costs of the services the wholesaler performs be-

[3] This brief focuses only on the wholesalers' role in reselling to retailers; it does not address such questions as may arise from retail sales by wholesalers.

[4] The suggestion in the opinion of the Court of Appeals that the discount to the wholesaler in this case "does not qualify as a functional or wholesale discount," Pet. App. A7, is the court's way of stating that it was not satisfied that "the services [Texaco's] wholesalers performed justified the amount of the discount," Pet. App. A8, n.4, but it was not a suggestion that the wholesalers were not independent business entities. The District Court's opinion noted that Texaco introduced "evidence that Dompier and to some extent Gull were performing marketing and advisory functions . . . ." Pet. App. B6 n.5.

cause if the discount exceeded the wholesaler's costs and a portion of the discount were passed on to retailers who competed with the direct-buying retailer, the Robinson-Patman Act would be violated.[5] Pet. App. A8. Since wholesaler discounts typically are not *de miminis*, such discounts could, in the view of the Court of Appeals, be illegal unless (1) the discount is based on the wholesaler's costs (and no surplus for passing-on remains), or (2) care is somehow taken to prevent a portion of the discount from being passed on to retailers who compete with directly purchasing retailers. Pet. App. A8.

The rule formulated by the Court of Appeals as a practical matter requires the supplier to come close to engaging in forbidden anticompetitive practices or to alter its distribution methods to the detriment of efficiency and competition.

1. *The Supplier Should Not Be Held to Cost-Based Discounts*

The Court of Appeals indicates that a wholesale discount would be legal if it could be shown to be accounted for by the costs of the services the particular wholesaler

[5] The stringency of the required correlation between the discount and the cost of the wholesalers' functions is unclear. The Court of Appeals uses differing formulations: *e.g.*, a discount raises questions if "in excess of the value of the services," Pet. App. A7-A8; the discount is to be "cost-based," *id.* at A8; the discount is to be "justified by the services" the wholesaler performs, *id.* at A9; the discount is suspect when "unrelated to the costs of the customer's function," *id.*; etc. It is clear, however, that the court below requires at least that there be a rough equivalency between the discount and the costs of the wholesaler's services; should the discount exceed those costs, according to the court, the supplier is on notice that the discount may, in part, be passed on to retailers to the detriment of direct-buying retailers. At no point does the court appear to acknowledge that the supplier is unlikely to know the wholesaler's costs, or that the wholesaler, as an independent business entity, could decide not to pass on the discount, or that a wholesaler's price may reflect the totality of its efficiencies or simply a competitively aggressive pricing policy.

performed. Pet. App. A8. The court appears to reason that, should the discount merely compensate the wholesaler for the cost of the functions it performs, there would be no price break to pass through to retailers. But a supplier rarely if ever has access to detailed information about the cost of services performed by independent wholesalers. Wholesalers themselves may not always possess such information; but even if they had it, they would be predictably and properly reluctant to share it with suppliers, particularly suppliers who compete with them by making sales directly to retailers. *Cf. United States* v. *Container Corp. of America*, 393 U.S. 333 (1969). Moreover, even if the relevant information existed and were made available to the supplier, difficult questions would arise as to the allocation of costs of services to various suppliers (where the wholesaler buys from more than one supplier) and as to the valuation of the costs of such diverse services, provided by wholesalers, as product promotion, extension of credit, and various types of advice, sometimes informal, and assistance, to retailers. Moreover, in setting its price to wholesalers, the supplier is also responding to competition from other suppliers selling to other wholesalers or to the same wholesalers and cannot always calibrate its prices as it pleases.

There are other flaws in the concept of a system of cost-based wholesaler discounts. First, any such system, even if practical, may well have the perverse and anticompetitive effect of destroying the wholesaler's incentive to operate an efficient low-cost business since increases in efficiency will be offset by a smaller discount. If, moreover, a supplier were to charge different prices to different wholesalers on the basis of the supplier's necessarily imperfect estimate of each wholesaler's cost of doing business, the supplier would be vulnerable to a conventional claim of price discrimination by its wholesalers.[6] Nor

[6] The Court of Appeals observed that one of the wholesalers in question had no bulk plant for temporary storage and that in the case of the other wholesaler, Texaco "in some instances" delivered gasoline directly to the wholesaler's customers. Pet. App. A8. It criticized Texaco for merely identifying some of the wholesaler functions and not providing a quantitative justification based on the wholesalers' costs for the discounts. *Id.* But Texaco, in establishing a distribution system, could well conclude that so long as it dealt with wholesalers that were independent business entities and that relieved it of some of the burdens of distribution to dealers, as these wholsalers did (the District Court referred to evidence of marketing and advisory functions, Pet. App. B6, n.5), it would not draw fine lines by providing varying discounts among its wholesalers, particularly in view of the absence of reliable information as to wholesaler costs.

could the supplier then invoke the statutory affirmative defense of cost justification, since that defense focuses on the supplier's costs, not those of the wholesaler. *Boise Cascade Corp.*, 107 F.T.C. 76, 211-12 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988); *Mueller Co.*, 60 F.T.C. 120, 127-28 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964).

In sum, the legality of a wholesale discount cannot and should not turn on the ability of the supplier to relate it to the costs of each wholesaler.

2. *The Supplier Cannot Legally Prevent Wholesalers From Passing on All or Part of Their Discounts*

Since suppliers cannot realistically correlate their discounts to wholesalers' costs, the only alternative left by the formulation of the rule in the decision below is that the suppliers somehow see to it that no portion of the wholesaler's discount is passed on to the wholesaler's customers.

Of course, since wholesalers are independent business entities, any program of control of wholesalers' prices would be flatly incompatible with the settled rule that vertical agreements on resale prices are *per se* violations of Section 1 of the Sherman Act. *Business Electronics*

Corp. v. *Sharp Electronics Corp.*, 485 U.S. 717, 724 (1988); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44, 46-47 (1960). Threatening to terminate wholesalers for failure to adhere to the suppliers' suggested prices may constitute a Section 1 violation. *See Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 765-68 (1984). And there is no basis for assuming that a vertical price-fixing arrangement could be justified by an asserted desire to comply with the Robinson-Patman Act. *Cf. United States* v. *United States Gypsum Co.*, 438 U.S. 422, 459 (1978).

Yet, the decision below may well have effects similar to those of resale price-fixing. Suppliers' attention will be directed to the pricing policies of their wholesalers, and by one means or another wholesalers may be led to understand that aggressive pricing is undesirable to suppliers. Indeed, the mere existence of the legal rule adopted by the Ninth Circuit is likely to encourage a wholesaler to follow the price leadership of its suppliers. And this will be so whether or not aggressive pricing by the wholesaler that otherwise may have occurred is made possible by wholesaler discounts or by wholesaler efficiencies. The opinion, in short, may stimulate behavior that will have anticompetitive consequences. Nor is the result any more palatable should concern with Sherman Act liability prevent any attempt to influence wholesalers' pricing decisions; then, as will be discussed below, the realistic recourse for the law-abiding supplier is to change its distribution to less efficient modes, again to the detriment of competition.

The anticompetitive sweep of the opinion below is not narrowed by reading it, as the Solicitor General's initial brief suggests, as applicable only if the supplier "knows" or "should know" that his wholesaler's customer is underpricing his direct retailer. Should the opinion below

survive, direct-buying retailers will inevitably take advantage of it by placing their suppliers "on notice" that wholesalers are underpricing them because of wholesaler discounts. Being so placed on notice, suppliers, inevitably lacking adequate information on wholesaler costs, would face the choice of coming close to the reach of the Sherman Act's prohibition against resale price agreements or accepting the inefficient and anticompetitive alternative of eliminating wholesaler discounts or discontinuing desirable dual distribution.

It follows, then, that in dual distribution situations the Court of Appeals has made the legality of wholesale discounts turn on knowledge (of wholesaler costs) that the supplier does not have; on activity (resale pricing) that suppliers cannot lawfully control; and on effects (lower prices to consumers) that are likely to be wholly procompetitive.

3. *The Supplier's Lawful Alternatives Reduce Efficiency and Competitiveness*

Since suppliers can neither ensure that wholesale discounts are "cost-based" nor lawfully prevent them from being passed on to retailers, they are left with but two legal means of complying with the Court of Appeals decision. Both are certain to have serious anticompetitive effects. First, a supplier could simply eliminate wholesale discounts and charge the same price to all customers, whether wholesaler or retailer.[7] At a minimum, this would adversely impact the wholesalers and the retailers who rely on them, who are often smaller retailers that

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[7] Although selling to those performing wholesaling functions at the same price as to retailers may be regarded as a form of economic discrimination, "the lower federal courts have consistently held that the practice of selling to all purchasers at a uniform price is legal. . . ." Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 B.C. Indus. & Com. L. Rev. 543, 550 (1976).

cannot effectively buy directly from the supplier. Such a result would be directly contrary to the underlying purpose of the Robinson-Patman Act, which was to prevent the lessening of competition that could arise from price favoritism to large, direct-buying chain stores over small retailers. *See* H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3-5 (1936).

The supplier's alternative means of complying with the Ninth Circuit's decision is equally inimical to competition and the purposes of the Robinson-Patman Act. Rather than abandoning wholesale discounts, the supplier might abandon dual distribution and sell exclusively to retailers or wholesalers, but not both, in a geographic market. Should the supplier elect to continue selling directly to large retailer customers, small retailers would lose out. In some markets this may deprive consumers of a convenient source of supply. Should the supplier elect to distribute its product solely through wholesalers, consumers would lose the benefits of an efficient dual distribution system, and may face higher prices as a result.[8]

II. NEITHER THE STATUTE NOR JUDICIAL PRECEDENT REQUIRES AN ANTICOMPETITIVE RULE

This Court should not adopt an extension of the Robinson-Patman Act so anticompetitive in its effects unless it is compelled to do so by the plain language of the statute, by clear legislative intent, or by a great weight of judicial precedent. In this case, the Court is under no such compulsion.

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[8] A supplier may seek to defend its price on a meeting competition ground. But suppliers may be wary of undertaking that burden. It should also be noted that there may be legal constraints against discontinuing supplies to current purchasers. The Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322, codified at 15 U.S.C. §§ 2801-41, for example, may prevent gasoline refiners from discontinuing sales to wholesalers or retailers. Where that is the case, the supplier's only recourse is to stop granting a functional discount.

Section 2(a) of the Robinson-Patman Act provides, in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

15 U.S.C. § 13(a). Absent the final clause of this provision, there would be no reason to think a uniform wholesale discount in a dual distribution situation could violate the statute, since retailers do not compete with either the person who grants the discount (the supplier) or the person who receives it (the wholesaler). The final clause, "or with customers of either of them," is far from being lucid or self-explanatory.[9]

The legislative history, to the extent it addresses functional discounts, indicates they were not among the evils aimed at by Congress. *See* S. Rep. No. 1502, 74th Cong., 2d Sess. 5 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8-9 (1936). Indeed, when one examines the origin of the "customers of either of them" clause, the recourse

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[9] For example, that phrase is redundant insofar as it refers to customers of the person who grants the discrimination; that is simply another way of describing "any person who . . . receives the benefit of such discrimination." In addition, the phrase may refer only to customers on the same functional level of purchasers on the same functional level. Or it may refer to customers on the same functional level of purchasers on different functional levels, but only where the price differentiation between the purchasers necessarily results in discrimination between the customers (as where a retailer, further down the distribution chain, receives a more favorable price from the supplier than does a wholesaler).

to that clause in the ruling below becomes even more dubious. This is because the "customers of either of them" concept was introduced by H. B. Teegarden, the General Counsel for the United States Wholesale Grocers' Association. To Amend the Clayton Act: Hearing before the House Committee on the Judiciary on H.R. 8442, H.R. 4995, H.R. 5062, 74th Cong., 1st Sess., 244, 251-52, 262 (1935). It is hardly likely that Mr. Teegarden, as counsel for a group of wholesalers, would have proposed language intended to place uniform wholesale discounts in jeopardy in dual distribution situations.

Nor does judicial precedent require or support the Ninth Circuit's use of the "with customers of either of them" clause. For decades antitrust lawyers have advised their clients that selling to wholesalers at a discount does not violate the Robinson-Patman Act, since wholesalers do not compete with direct-buying retailers. A great weight of authority supports this view.[10]

[10] The Solicitor General agrees with Petitioner that "[a] rule broadly subjecting suppliers to the threat of damage liability if an independent wholesaler elects to undercut the supplier's price to retailers—and a jury later concludes that the wholesale discount was not cost based—would represent a significant extension of the law." Br. for United States 9. It acknowledges that such an extension would "undercut the procompetitive purposes of the antitrust laws." *Id.* at 11. The Solicitor General's brief, in the course of arguing that this particular case does not warrant review by this Court, attempts to distinguish several cases cited by *amici* that they concede contain "general statements" that uniform wholesale discounts are legal. *Id.* at 13 n.15. These attempted distinctions are unpersuasive. The court in *White Indus., Inc.* v. *Cessna Aircraft Co.*, 845 F.2d 1497 (8th Cir. 1988), *cert. denied*, 109 S.Ct. 146 (1988), clearly upheld the legality of a two-channel distribution system based on a uniform discount to wholesalers. The court did *not* say the Act would have been violated if the wholesaler "passed on the discount to end users," Br. for U.S. 13 n.15, but rather that it would violate the Act if wholesalers *"sold aircraft directly to end-users"*—that is, competed with direct-buying retailers. 845 F.2d at 1498 (emphasis supplied). The Solicitor General does not attempt to distinguish the statement in *Eximco, Inc.* v. *Trane Co.*, 737 F.2d 505, 515 (5th Cir. 1984) that "[a] plaintiff alleging secondary-line injury must prove that a seller made a sale to two different buyers at the same functional level of competition, charging different prices to each," but merely notes that this was not the narrow holding of the case. Br. for U.S. 13 n.15. *Dart Indus., Inc.* v. *Plunkett Co.*, 704 F.2d 496 (10th Cir. 1983) does far more than simply "reject the naked assertion that different prices charged to a wholesaler and to a retailer are necessarily unlawful," Br. for U.S. 13 n.15; it states that "[t]he difference in the prices charged to [a wholesaler] and those charged to [retailers] do not constitute a Robinson-Patman violation . . . . Illegal price discrimination requires that the same product be sold at different prices to competitors." 704 F.2d at 499. These statements by federal courts of appeals are echoed by the FTC's recent statement that "[i]f the wholesaler does not sell to end-user customers in competition with the retailer, the difference in the prices that the wholesaler and the retailer pay cannot support a claim of secondary line competitive injury under the Act." *Boise Cascade Corp.*, 107 F.T.C. 76, 199, *rev'd and remanded on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988). *See also Pierce* v. *Commercial Warehouse*, 1988-1 Trade Cas. (CCH) ¶ 68,009 at 58,164 (N.D. Fla. 1988) ("Where a manufacturer sells to jobbers at one price and to retailers at another price, a retailer who bought from the jobber has no complaint under the Act because he paid a higher price for the same goods than his retailing competitor who bought directly from the manufacturer."). In short, there can be no serious dispute that the Ninth Circuit's opinion significantly breaks with prior law.

The Ninth Circuit purported to recognize that charging different prices to customers at different levels of distribution generally does not violate the Robinson-Patman Act, Pet. App. A7, A9, but nevertheless reached the conclusion that "a section 2(a) violation may occur if (1) the discount they received was not cost-based and (2) all or a portion of it was passed on by them to customers of theirs who competed with [direct-served retailers]." *Id.* at A8.

The Court of Appeals cited three cases as authority: *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948); *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969); and *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983). *Morton Salt and Vanco* are inapposite;

Perkins need not and should not be read to stand for the anticompetitive result reached by the Ninth Circuit.

In *Morton Salt* the supplier granted a "standard quantity discount" that was uniquely available only to five large direct-buying retailers, who therefore paid less than wholesalers and were able to sell at retail more cheaply than to wholesalers could sell to their retailers, some of whom competed with the favored retailers. 334 U.S. at 41. *Morton Salt* also involved differences in prices between "wholesalers and retailers who competed with other wholesalers and retailers." *Id.* at 42.

The *Morton Salt* decision is clearly inapplicable to the case at hand. Where the price break goes to those further down the chain of distribution, there can be little doubt or speculation as to the adverse impact on other retailers who buy from the disfavored wholesalers.[11] Moreover, this abuse of quantity discounts was one type of situation expressly aimed at by the Act.[12] No uniform functional discount to wholesalers was involved or challenged.

In *Vanco* a beer supplier charged different prices to two wholesalers. This disparity, not surprisingly, was reflected in their respective prices to their retailers, who were in competition with one another. Charging different prices to customers at the *same* distribution level is price discrimination of a conventional kind, and sheds little light on the treatment to be accorded a uniform wholesaler discount.

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[11] This consequence was so inevitable and apparent that the Court viewed the practice as one in which "manufacturers . . . sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." 334 U.S. at 50.

[12] The original provisions of Section 2 of the Clayton Act, which the Robinson-Patman Act corrected, did not prevent price discrimination on account of differences in quantity. Act of Oct. 15, 1914, ch. 323, § 2, 38 Stat. 730.

Perkins, properly viewed, is also distinct from this case on its facts. In *Perkins* the favored customer controlled the subsequent purchasers, including the ultimate retailer. In effect, therefore, *Perkins* may be said to involve a sale by the supplier to a retailer at a different price than to other retailers. The Court observed that Signal (the favored buyer)

> "transferred the gasoline first to its subsidiary, Western Hyway, which in turn supplied [Western's subsidiary] the Regal stations. . . . We find no basis in the language or purpose of the Act for immunizing Standard's price discriminations simply because the product in question passed through an additional *formal* exchange before reaching the level of Perkins' actual competitor."

395 U.S. at 648 (emphasis supplied).

To be sure, the Court's opinion suggested that it would have made no difference if each of the buyers in the chain had been separately owned. *Id.* at 647. But the opinion has not been applied so broadly, and in any event should not be read as supporting the proposition that a supplier in a dual distribution situation may be liable for uniform discounts to independent wholesalers whose pricing practices are outside its control.[13]

CONCLUSION

A rule that subjects uniform functional discounts to independent wholesalers in a dual distribution situation to Robinson-Patman exposure would deter much procompetitive activity. In particular, a rule that turns on whether the amount of the price differential was justified by wholesaling costs would require a costly, detailed, and ultimately fruitless inquiry, and typically would call fo

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[13] Since Perkins, the complainant, and Signal, the favored buyer, were both also wholesalers, the *Perkins* decision also can be viewed as involving discrimination at the same functional level and so as inapposite to the case at hand.

information that, if it exists at all, is not in the possession of the supplier when it makes its pricing decision. Such a rule would penalize any wrong guess as to wholesaler costs and any wrong judgment as to the resale pricing of the wholesaler. The rule, consequently, might discourage independent pricing by wholesalers. And this would be so whether the low price a wholesaler would have charged reflects a wholesale discount, an unusually efficient wholesaler, or simply an unusually aggressive competitor. Alternatively, the rule could lead to the demise of the wholesaler discount and of dual distribution.

Nor is the rule sustainable if narrowed to require actual knowledge on the part of the supplier of the effect of the wholesaler discount. It would then have a perverse result. The lowest-cost wholesalers, and those competing most agressively, would be the most likely to come to the attention of the supplier and so lose their discount. This in turn would discourage wholesalers from competing by cutting prices. Moreover, retailers will as a matter of course place suppliers on notice of supposed excessive discounts, with the same anticompetitive consequences as flow from the rule before narrowing.[14]

At the heart of the difficulty with the decision below is that the supposed discrimination between competing retailers results from a multiplicity of factors affecting independent wholesalers' pricing decisions that are not

[14] The attention to what the supplier knew or should have known seems to have originated in Standard Oil Co. v. FTC, 173 F.2d 210, 217 (7th Cir. 1949), *rev'd*, 340 U.S. 231 (1951). In response to this decision, the FTC modified a paragraph of its order to forbid wholesale discounts only if Standard Oil knew its price to direct-buying retailers was higher than the price paid by competing retailers to wholesalers. 49 F.T.C. 923, 956 (1953). However, when the case came before this Court a second time, the Solicitor General abandoned the modified paragraph entirely and conceded that Section 2(a) of the Robinson-Patman Act was not properly addressed to such activities. Reply Brief for the Federal Trade Commission at 32, FTC v. Standard Oil Co., 355 U.S. 396 (1958).

controlled, or even known, by suppliers and that can reflect a variety of considerations other than the discount. Given the implausibility of suppliers acting deliberately to injure their own businesses with direct-buying retailers, and given the anticompetitive consequences of the ruling of the court below, the decision should be reversed and the Court should hold that uniform wholesaler discounts accorded independent wholesalers are not subject to challenge under the Robinson-Patman Act by direct-buying retailers.

Respectfully submitted,

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